In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-681

HENRY ERNST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on two counts of having possessed, sold, transferred and delivered counterfeit obligations of the United States in violation of 18 U.S.C. 472 and 473 and on one count of having conspired to commit those offenses in violation of 18 U.S.C. 371.[1] Petitioner was sentenced to concurrent terms of six years' im-

[1] A co-defendant, Tom Dunn Ray, pleaded guilty prior to trial and testified for the government.

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prisonment.[2] The court of appeals affirmed without opinion (Pet. App. A).

The evidence at trial showed that prior to December 1970, one John Sistrunk pleaded guilty to having dealt in counterfeit obligations. He agreed to cooperate with the government in apprehending others involved in the counterfeiting operation. In late December 1970, Sistrunk arranged a meeting in Jackson, Mississippi, between agent Clint Howard of the Treasury Department, who was acting in an undercover capacity, and co-defendant Tom Dunn Ray. Ray agreed to sell Howard $20,000 in counterfeit twenty-dollar bills. To effectuate this sale, Ray contacted petitioner and petitioner agreed to deliver $50,000 in counterfeit hundred-dollar bills which he had in his possession to Jackson, Mississippi.[3] Ray had arranged to exchange these bills with another person who had counterfeit twenties. Petitioner delivered the counterfeit hundred-dollar bills on January 1, 1971, for which he received $500. Ray then exchanged the bills as planned for counterfeit twenties and sold the twenties to agent Howard the next day. Ray, Sistrunk, and Howard agreed to a second purchase and sale of counterfeit bills as soon as the printer could produce

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[2] The sentence imposed on the conspiracy count pursuant to 18 U.S.C. 371 exceeds the statutory maximum of five years' imprisonment. This sentence, however, runs concurrently with the sentences on the other two counts which are within the statutory limitations, so petitioner's rights have not been affected by this error.

[3] Ray had an agreement with petitioner whereby Ray left counterfeit money with him "on a consignment basis," with petitioner paying him ten percent of any sales (Tr. 31–32).

the quantity and denominations desired (Tr. 34–38, 90–102, 148–153).[4]

On January 25, 1971, Ray contacted petitioner, who agreed to retrieve a package of counterfeit currency from the printer in Baton Rouge and bring it to New Orleans for $700. On January 26, Ray, Sistrunk and Howard met in New Orleans and Ray agreed to sell agent Howard $100,000 in bogus twenty-dollar bills. Ray and Sistrunk then met with petitioner and arranged for the transfer of the bills which were in petitioner's possession. That afternoon, as agreed, petitioner parked his pick-up truck in a supermarket parking lot. Agent Howard stopped at the lot and told petitioner there would be a delay in taking delivery. Petitioner responded that they should hurry up, because he wanted the stuff out of his car as quickly as possible. Treasury agent Shaddick, who was also operating undercover, then went to the market and picked up a package from petitioner's truck containing $147,000 in counterfeit currency. Petitioner and Ray were arrested later that day (Tr. 39–42, 102–108, 153–160, 189–193).

1. Petitioner raises a host of challenges to his conviction, none of which is substantial. He first contends (Pet. 19–28) that the counterfeit money picked up by agent Shaddick from his truck should have been suppressed as the result of an illegal "search and seizure." However, the evidence developed at a pre-trial hearing on petitioner's motion to suppress showed

[4] Tr. refers to the reporter's transcript of the proceedings at trial.

clearly that petitioner had consented to the pick-up, which was in accord with arrangements previously made by the coconspirators and Howard (M. Tr. 7-10, 14-20).

2. Petitioner also contends (Pet. 41-60) that the evidence was insufficient. However, the evidence summarized above showed that petitioner conspired with Ray to deliver to government undercover agents a large amount of counterfeit currency which he had in his possession, and that he did, in fact, make such delivery on January 26, 1971, by placing the currency in his vehicle at a predetermined location. The facts that Ray negotiated the sale and that the contraband was secreted in petitioner's car rather than on his person at the time of delivery do not affect his guilt.

3. The indictment initially returned by the grand jury charged petitioner with conspiracy but omitted the statute citation. Prior to arraignment a superseding indictment was filed which added only the conspiracy statute citation, 18 U.S.C. 371. It does not appear from the record that a copy of the superseding indictment was mailed to petitioner. At arraignment the penalties on each count, including the distinct penalties for conspiracy, were explained to petitioner at which time he waived the reading of the indictment (Transcript of proceedings at arraignment, March 17, 1971, pp. 2-4). Petitioner contends (Pet. 61-65) that since he failed to receive a copy of the superseding indictment containing the conspiracy citation and waived its reading at arraignment, he did not have notice of the conspiracy charge and therefore should

not have been tried for conspiracy. However, since the original indictment which petitioner did receive apprised him of the actions with which he was charged, he clearly could have suffered no prejudice from the omission of the statute citation. *Theriault* v. *United States,* 434 F. 2d 212, 213 (C.A. 5), certiorari denied, 404 U.S. 869; *United States* v. *Clark,* 416 F. 2d 63, 64 (C.A. 9); Fed. R. Crim. P., Rule 7(c). Petitioner's further claim (Pet. 77) that submission of the superseding indictment to the jury was prejudicial is without merit.

4. Prior to trial petitioner moved for discovery of all statements made to the authorities by him or co-defendant Ray and for discovery of all evidence obained from wire taps (App. 27–29).[5] He further moved for production of various other information in a bill of particulars (App. 32–37). In response (App. 39–41) the government produced all of petitioner's statements in its possession and denied the existence of any wiretaps. The trial court denied (App. 42) petitioner's other motions for production of information which sought disclosure of the government's entire case. Petitioner's assertion (Pet. 28–35) that this denial, which lay within the discretion of the court, was error has no merit. See *Overton* v. *United States,* 403 F. 2d 444, 446 (C.A. 5); *Downing* v. *United States,* 348 F. 2d 594, 599 (C.A. 5), certiorari denied, 382 U.S. 901.

[5] "App." refers to the appendix of the parties in the court of appeals.

5. Petitioner raises various objections to the admission of evidence. For example, petitioner objects (Pet. 35–38) to the admission of agent Howard's testimony (Tr. 94–95) that he was told by Sistrunk and Ray that petitioner was bringing counterfeit money to Jackson, Mississippi. This testimony, however, was plainly admissible under the co-conspirator exception to the hearsay rule. Moreover both Sistrunk and Ray testified that petitioner did deliver the bills to Jackson (Tr. 36, 149–150). Petitioner also objects (Pet. 38–41) to agent Giuffre's qualifications as an expert on counterfeit bills; he also objects to the admission of the bills on the ground that a proper chain of evidence had not been established. The record shows that agent Guiffre positively identified the bills introduced into evidence as the ones from petitioner's truck since he had marked them with the date and his initials when they were seized (Tr. 202). Agent Giuffre further testified that he had received extensive training in detecting counterfeit currency. Certification of an expert witness lies within the discretion of the trial court and there was no abuse here. *De Freese* v. *United States,* 270 F. 2d 737, 739–740 (C.A. 5), certiorari denied, 362 U.S. 944; *United States* v. *Alker,* 260 F. 2d 135, 155–156 (C.A. 3), certiorari denied, 359 U.S. 906.

6. Petitioner alleges that the trial court's refusal to give various requested instructions was error. Despite petitioner's contention (Pet. 65–71), an entrapment instruction was not necessary; there was no evidence that the government induced petitioner to commit the acts charged in the indictment. *United States* v. *Aloi-*

sio, 440 F. 2d 705, 711 (C.A. 7), certiorari denied, 404 U.S. 824; *United States* v. *Dono,* 428 F. 2d 204, 209 (C.A. 2), certiorari denied *sub nom. Bonaguro* v. *United States,* 400 U.S. 829. Instead, petitioner was engaged in the counterfeit operations prior to the purchases made by agent Howard (Tr. 32). The essence of petitioner's requested instructions on accomplice and informer testimony was charged by the trial court (Tr. 301–303). Petitioner's other objections to the charge are insubstantial, as the record shows the court properly charged on circumstantial evidence (Tr. 298), conspiracy (Tr. 310–312), possession (Tr. 314–316), knowledge of the counterfeit nature of the currency (Tr. 312, 314, 317), and aiding and abetting (Tr. 317).

7. Petitioner's contentions concerning the denial of his post-trial motions raise no issues other than those considered above.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972